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IN THE

Supreme Court of the United States

October Term, 1987

Honorable BERTRAM R. GELFAND,
Surrogate, Bronx County,

Petitioner,

v.

New York State Commission on Judicial Conduct,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Does the due process clause of the Fourteenth Amendment of the United States Constitution apply in a proceeding to remove a state judge pursuant to state law?

2. If the due process provision of the Fourteenth Amendment does apply, does it preclude the removal of a judge from office based upon findings as to charges of which he never received notice and never had the opportunity to defend?

3. Can the New York Court of Appeals circumvent the due process provision of the United States Constitution by finding with reference to a proceeding of the New York State Commission on Judicial Conduct, (the administrative body involved in disciplinary proceedings) that "it was unnecessary and indeed improper for the

Commission to include in its determination extensive findings of fact and legal conclusions based on uncharged incidents -- often of a sensational nature. -- *** Due process requires that petitioner not be deprived in this proceeding of his interest in continuing as a judge because of the uncharged misdeeds," and then go on to make its own plenary findings which themselves go beyond any charged conduct and utilize this uncharged conduct as the foundation for affirming the removal from office of petitioner?

4. Should the United States Supreme Court tolerate such shockingly wrong conduct as allowing the only Court involved in the judicial disciplinary process of a state to wrongfully deprive a respected jurist of office in violation of the due process provision of the Fourteenth Amendment of the United States Constitution, and leave the jurist without

a single avenue of review?

5. Does it not in itself violate the due process provision of the Fourteenth Amendment for the New York Court of Appeals to ignore the determinations of the United State Supreme Court that once a record has been poisoned by proof and findings which go beyond the charged conduct, there exists a right to a new hearing, particularly where proof as to the uncharged conduct and the findings based thereon are of an inflammatory nature?

Parties

The parties to the proceeding below are listed in the caption.

TABLE OF CONTENTS

Table of Authorities

Statutes

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No.

In the Matter of the Honorable Bertram R. Gelfand, Surrogate, Bronx, County

Petitioner,

For Review of a Determination of State Commission on Judicial Conduct,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

PETITION FOR WRIT OF CERTIORARI

Petitioner, Bertram R. Gelfand, respectfully prays that a writ of certiorari issue to review a judgment of the New York State Court of Appeals, which accepted, **PER CURIAM**, the determination of the New York State Commission on Judicial Conduct that petitioner be removed from

his office as Judge of the Surrogate's Court of Bronx County.

Opinions Below

The opinion of the Court of Appeals of the State of New York is not yet reported and is set forth in the Appendix (pages A-37 to A-46). The Determination of New York State Commission on Judicial Conduct is not officially reported and is set forth in the Appendix (pages A-6 to A-36). The judgment of the Court of Appeals was entered July 2, 1987 and a motion seeking to re-argue and for reconsideration of said judgment was denied, without opinion, on August 27, 1987. The Formal Written Complaint that is the foundation of the entire proceeding is set forth in the Appendix (pages A-1 to A-5). The jurisdiction of this Court to review the judgment of the New York Court of Appeals by Writ of Certiorari is conferred by 28 USC 1257 (3).

STATEMENT OF CASE

New York State's Judicial Disciplinary Procedure

Pursuant to the New York State Judiciary Law, Article 2-A there is created an eleven member, part time, judicial disciplinary commission consisting partially of judges, practicing lawyers and lay individuals (Judiciary Law, Sec. 44). The commission has the power on complaint, or its own initiative, to investigate judicial conduct and upon completing its investigation to close the matter or to file a formal complaint, which it then refers to a referee of its selection to hear and report (Judiciary Law, Sec. 44). The commission then reaches a determination as to acceptance of its referee's report and as to an appropriate sanction, and forwards its determination to the New York State Court of Appeals. If the subject of the

proceeding does not seek review within 30 days, the commission's determination becomes final. If such a review is sought, the Court of Appeals has exercised the power to not only pass on all questions of law and fact, but apparently within the framework of Judiciary Law, Section 44 (9) to make its own independent findings of fact. The State Commission on Judicial Conduct initiated the proceeding by issuing a formal written complaint against petitioner which is set forth in the Appendix (pages A-1 to 5). Previously, by an administrator's complaint, dated December 5, 1985, the Commission had commenced a six month investigation into certain broad allegations of misconduct on the part of petitioner, all of which involved a private relationship with one of his 42 employees. At the completion of its investigation, it issued a formal

complaint containing eight specific allegations.

Significantly, the complaint: (1) contained no charge of misconduct prior to August 3, 1985; (2) contained no charge of misconduct relating to petitioner's performance of either his judicial function or administration of his staff; (3) did not allege that the employee's 1985 resignation resulted from her personal relationship with petitioner (one of the original charges investigated by the Commission); and (4) did not allege that petitioner attempted to prevent the former employee from obtaining legal employment (an original charge investigated by the Commission).

Petitioner filed a verified answer and prepared to meet the charges in the written complaint at the hearing. Petitioner and his counsel acted reasonably in preparing to meet the

allegations of the complaint only, and in expecting that, as the Judiciary Law provides, the hearing would be conducted only "with respect to" those allegations and not with respect to the initial allegations which had been investigated, considered and rejected by the Commission (Judiciary Law, Sec. 44 (4).

Over objection, the Referee permitted the introduction of evidence that went beyond the formal complaint both as to time and subject matter. In petitioner's reply memorandum to the Referee petitioner vigorously opposed the Commission's effort to convict petitioner on the uncharged offenses.

Petitioner's protest was neither addressed nor respected by the Referee. The Referee issued his report dated December 31, 1986. The report contained 33 findings of fact, 20 of which related to events pre-dating the August 3, 1985

through December 1985 period referred to in the complaint, and unrelated to the charges in the formal complaint. The report also contained a lengthy recitation of highly prejudicial "evidence". The report ended with two conclusions of law. The Referee first concluded that the charges against petitioner in the complaint had been sustained by the evidence. The Referee next reached a conclusion of law relating to matters outside of the complaint:

> "In allowing a personal relationship with a member of his official staff to influence his administrative decisions pertaining to that person's continued employment or termination of employment with his office, respondent failed to uphold and maintain the high standards of conduct appropriate to his office as Judge of this state. He engaged in impropriety by inextricably intermingling his personal interests with his official administrative duties and responsibilities. By his conduct, respondent created the appearance of impropriety, as well as bringing disrepute to the office he holds. His conduct was prejudicial to the proper administration of the Office of Surrogate of Bronx County."

This pattern was repeated before

the Commission. Counsel to the Commission moved to have the Commission confirm the report. The Memorandum of Law by Counsel to the Commission in support of his Motion to Confirm the Referee's Report dated January 2, 1987 repeated the unfair approach used before and embraced by the Referee, and recommended that petitioner be removed from office on the basis of uncharged conduct. Again, petitioner objected to the adoption of any portion of the Referee's Report which fell outside of the complaint. Petitioner argued that, as Commission's Counsel had conceded prior to hearing, the extreme sanction of removal was not warranted by the specific charges of the formal complaint. Petitioner pointed out that the principal finding of the Referee that he had allowed his personal relationship with a member of his staff to influence his administrative decisions with respect to her continued

employment was never charged, and if charged could have been disproven, as it was in the investigatory stage of the proceedings. What is totally side-stepped is the undisputed fact that in the investigatory stage, the issue of whether petitioner was professionally justified in firing Ms. Gertel was completely examined and no charge was ever voted that petitioner was not justified in requesting and receiving her resignation on July 21, 1985, effective September 4, 1985.

It is not disputed that the deftly worded allegation number 4 (a) in the complaint (A-2) is not a charge that petitioner fired Ms. Gertel on August 3, 1985, it is simply an allegation that he made such a statement to her. It is also not disputed that her employment had previously terminated effective September 4, 1985 pursuant to her letter of resignation dated July 21, 1985.

Likewise, it is also not disputed that petitioner's statement of Saturday, August 3, 1985 that accelerated her termination to August 2, 1985 was withdrawn by petitioner on Sunday, August 4, 1985, and was never acted upon. None of these points constitute issues of fact in the proceeding.

Thus, the complaint in no respect alleges wrongful discharge for personal reasons or otherwise. It merely alleged the making of a statement relative to discharge for personal reasons which statement was made in anger, was almost immediately withdrawn, and was never acted upon. That these are the circumstances surrounding that statement is not an issue of fact in the case and never was an issue of fact in the case.

Based upon the Referee's report, the Commission's Determination contained 44 findings of fact, 24 of which concerned

a time period and subject matter outside of the allegations in the formal complaint. The Commission's 44th finding of fact relating to petitioner's "candor" contained 11 sub-parts, 5 of which related solely to events outside of the complaint and whose gravamen could not help but influence the remaining subdivisions of this finding.

Under New York statute, the Commission's finding becomes binding if a review is not sought from the New York Court of Appeals within 30 days of the Commission's Determination. Petitioner exercised his right to such a review. Although the petitioner was represented by new counsel on appeal, the Court of Appeals **sua sponte** took the case outside of the time schedule provided for under its usual rules and accelerated the time for filing briefs and argument in accordance with the campaign of an

aspirant to petitioner's position who wished the matter to be heard before the Court's summer recess so that if petitioner were removed, there would be an election in 1987.*

The Court of Appeals in disposing of the matter rendered an opinion in which it determined:

"Accordingly, it was unnecessary and indeed improper for the commission to include in its determination extensive findings of fact and legal conclusions based on uncharged incidents -- often of a sensational nature -- which preceded the dates covered by the complaint or to consider such conduct in its determination of sanction. Indeed, the Commission's responsbility to safeguard the public's trust in the judiciary by both shielding innocent judges from unjust charges and exposing and disciplining those who have abused their office is not fulfilled where uncharged conduct forms the basis of its published determination. Due process requires that petitioner not be deprived in this proceeding of his interest in continuing as a judge because of the uncharged misdeeds..." (Emphasis added) (A-44, A-45)

*Ironically despite an immense media campaign geared to smear petitioner, this person never succeeded in qualifying to become a candidate in the election to succeed petitioner.

The Court of Appeals then went, in apparent reliance on Judiciary Law, Sec. 44 (9), to not simply review the Commission's findings of fact, but to arrive at its own findings of fact which did not merely reduce the Commission's findings, but resulted in new findings that exceeded the framework of the Formal Written Complaint against which petitioner was defending himself.

Judiciary Law, Sec. 44 (9) reads as follows:

"In its review of a determination of the commission, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. After such review, the court may accept or reject the determined sanction; impose a different sanction including admonition, censure, removal or retirement for the reasons set forth in subdivision one of this section; or impose no sanction."

That the Court of Appeals embarked on new findings against petitioner which exceeded the perimeters of the Formal Written Complaint was not only offensive

to the due process provision of the United States Constitution, but exceeded the authority granted to it by the statute. Once the Court of Appeals found that the Commission's findings of fact were recklessly and prejudicially in excess of the bounds of the complaint, it either had to reduce the sanction, dismiss the complaint, or remand the matter for a new hearing. It certainly could not compose a whole new set of findings that went beyond the complaint in order to salvage the sanction recommended by the Commission.

The gravamen of the Court of Appeals own review of the evidence is as follows:

"Upon full factual review of the evidence adduced before the referee (NY Cons art 6, Section 22[d]; Judiciary Law Section 44 [9]), we conclude that, during the period of August 3, 1985 to December 31, 1985, petitioner misused his position as Surrogate of Bronx County by making administrative and personnel decisions taking official actions, and making implicit and explicit threats to court officials and others in order to prolong a sexual relationship with a law assistant and, later, to exact personal vengeance

when she refused to continue their affair." (Emphasis added) (A-39, A-40)

The Court of Appeals went on in its decision to make further findings of uncharged conduct as follows:

"Petitioner confronted the boyfriend, accused him of "harboring" the law assistant and threatened to speak to his employer, the Bronx County District Attorney, to have him fired* if he did not reveal the whereabouts of the law assistant." (A-41)

"We conclude that this conduct constituted inexcusable violations of sections 100.1 and 100.2 of the Code of Judicial Conduct." (A-42)

The ultimate conclusion of the Court of Appeals was that: "...the determined sanction of removal is accepted, without costs." (A-45)

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*Petitioner was never charged with threatening to have the "boyfriend" fired. This elaboration arose for the first time in hearing testimony that went beyond the charges.

Reasons for Granting the Writ

The New York State Court of Appeals specifically found that the Commission had violated petitioner's due process rights under the United States Constitution by making numerous findings against him with reference to conduct which was beyond the framework of its very limited complaint. The findings which went beyond the complaint, were matters which petitioner never had the opportunity to defend against, and to which he had good and valid defenses. They were also highly inflammatory. The Court of Appeals itself refereed to them as "often of a sensational nature." While the New York State Court of Appeals indicated it was disregarding this extraneous matter, it, nevertheless, quoted the most inflammatory aspects of it in referring to the commission's report.

More seriously, the Court of Appeals

after condemning the commission for its unconstitutional conduct in exceeding the complaint, went on to find petitioner guilty of conduct not contained in the formal complaint, to wit: "...petitioner misused his position as Surrogate of Bronx County by making administrative and personnel decisions, taking official actions, and making implicit and explicit threats to court officials and others in order to prolong a sexual relationship with a law assistant and, later, to exact personal vengeance when she refused to continue their affair." (Emphasis added) (A-40)

At no point in the complaint is petitioner alleged to have made an administrative or personnel decision either to prolong a sexual relationship or to exact personal vengeance. At no point in the complaint is petitioner alleged to have made implicit or explicit threats to

court officials or others in order to prolong a sexual relationship or exact vengeance. These horrendous and very inflammatory findings are not remotely within the framework of the complaint against which petitioner defended himself.

Thus, petitioner, a jurist for 14 1/2 years, with an exceptionally distinguished record* and 13 1/2 years remaining on his present term, has been deprived of a substantial property right (his office and his reputation) by his removal from office on allegations that he

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*Petitioner's record as a jurist has been so outstanding that on five occasions he was included in groups of from four to seven judges forwarded to the Governor of the State of New York by the State Commission on Judicial Nominations as exceptionally well qualified for the Governor to appoint the state's highest court. On one occasion he was one of nine judges which the same Commission forwarded to the Governor as being exceptionally well qualified to be appointed Chief Judge of the State of New York. The Referee selected by the Commission on Judicial Conduct to sit on petitioner's case was an unsuccessful competitor of petitioner's to

(Continued on next page)

never had an opportunity to defend in violation of his right under the United States Constitution.

An additional statutory penalty that flows from the Court of Appeals' finding is to disqualify petitioner from holding judicial office for life. There can be no doubt that procedural due process is required in a hearing pursuant to Section 44 of the Judiciary Law where a judge may be removed from office and, if removed, will be rendered ineligible to hold any other judicial office. Judiciary Law Section 47. If an individual has a legitimate claim of entitlement to hold a particular position, such as tenure,

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be on the nomination list for Chief Judge of the state. Petitioner is the only state trial level judge so honored by the Commission on Judicial Nominations to be chosen among the select few that were "found exceptionally well qualified" for the position of Chief Judge or Associate Judge of the Court of Appeals.

deprivation of that position, constitutes deprivation of property. See Perry v. Sinderman, 408 U.S. 593, 601-03 (1972); Colm v. Vance, 567 F. 2d 1125, 1127-29 (D.C. Cir. 1977). The ability to pursue a particular occupation is a liberty interest, and to foreclose an individual's opportunity to pursue a career by barring him from that career or firing him in a manner which imposes such a stigma that it will prevent him from obtaining employment in that career, constitutes deprivation of liberty. See Board of Regents v. Roth, 408 U.S. 564, 572-74 (1972); Cox v. Northern Virginia Transportation Comm., 551 F. 2d 555,558 (4th Cir. 1976). Due process interests extend to the right to practice law, see e.g., In re Ruffalo, 390 U.S. 544, modified on other grounds, 392 U.S. 919 (1968), and the right to remain

in judicial office. See Sarisohn v. Appellate Division, Second Department, Supreme Court of the State of New York, 265 F. Supp. 455, 458 and n. 1 (E.D.N.Y. 1967).

As the Supreme Court stated in the seminal case of Mullane v. Central Hanover Bank & Trust Co.,

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance ...
>
> But when notice is a person's due, process which is a mere gesture is not due process."

339 U.S. at 314-315 (citations omitted).

The United States Court of Appeals for the Eighth Circuit has established specific guidelines for providing notice which comports with the due process requirements of the Fourteenth Amendment.

In an action involving dismissal of a tenured professor that court held that, in such employment actions, a party is entitled to:

> 1) clear and actual notice of the reasons for termination in sufficient detail to enable him or her to present evidence relating to them;
>
> 2) notice of both the names of those who have made allegations against the [individual] and the specific nature and factual basis for the charges;
>
> 3) a reasonable time and opportunity to present testimony in his or her own defense; and
>
> 4) a hearing before an impartial board or tribunal."

King v. University of Minnesota, 774 F. 2d 224, 228 (8th Cir. 1985, cert. denied, 106 S. Ct. 1491 (1986) (citing Brouillette v. Board of Directors of Merged Area IX, 519 F. 2d 126 (8th Cir. 1975). Petitioner received none of these safeguards, but upon this application relies upon the denial of the first two criteria enumerated by the 8th Circuit.

The singular significant federal examination of the New York judicial disciplinary procedure, which affects over 3,300 judges, was an omnibus attack on New York's then removal statute in the United States District Court for the Eastern District of New York (Sarisohn v. Appellate Division, Second Department, Supreme Court of the State of New York, 265 F. Supp. 455, 458 (E.D.N.Y. 1967). At that time, New York's removal procedure provided for removal "for cause". The statute survived a constitutional challenge only by being interpreted to mean "for a cause enumerated and specified in each particular instance so that the defendant may be duly notified and adequately prepared to meet the charges". The present statute requires that a hearing be held only upon a formal complaint specifying the charges.

Under the judicial disciplinary

procedure that presently exists in New York, the New York Court of Appeals is the first and only judicial body involved in the judicial disciplinary procedure. It is the Court of first and last resort. It would be shockingly wrong to confer upon it the power to recklessly disregard the United States Constitution's guarantee of due process and leave an aggrieved party whose life has been destroyed by this action without any avenue for relief. Such a precedent would expose New York's approximately 3,300 judges to arbitrary removal from office and will severely impugn judicial independence by exposure to such risk. It would confer upon the Court of Appeals an arbitrary unconstitutional power over the tenure and lives of an entire class of aggrieved citizens.

It is incumbent upon this Court to clarify to the New York Court of

Appeals that the due process guaranteed by the United States Constitution is not a protection limited to the rights of murderers and rapists. It equally attaches to decent citizens who have substantial interests at stake.

The instant matter presents an exercise in judicial gymnastics by the Court of Appeals designed to not only deny due process, but to immunize the denial from any review. The federal due process issue was specifically raised. The New York Court of Appeals conceded that it was properly raised, and stated that it would disregard all the findings presented to it which were made in violation of petitioner's due process rights to be tried only on the conduct alleged in the complaint. However, the New York Court of Appeals then proceeded to make its own plenary findings which materially and substantially exceeded the conduct charged

in the complaint. It then utilized these findings as the foundation for affirming the sanction which the State Commission on Judicial Conduct had unconstitutionally arrived at by utilizing findings beyond the charges.

In effect, the New York Court of Appeals embraced and utilized the very same unconstitutional conduct for which it condemned the Commission on Judicial Conduct. While the transgressions of the Commission were reviewable by the Court of Appeals, the **ab initio** transgressions of the Court of Appeals are beyond review except by this Court.

In N.L.R.B. v. Homemaker Shops Inc., 724 F 2d 535, the 6th Circuit held that "[d]ue process requires that a party charged with unlawful conduct be given a `meaningful opportunity to meet the complaint.'"

The conduct of the New York Court

of Appeals denied petitioner the opportunity to not only defend himself from the uncharged conduct, but even to argue against it. Before the Commission, petitioner knew what uncharged conduct the Referee had found and the extent to which this uncharged conduct was being advanced by the Commission's Counsel as a basis for removal. As to the uncharged conduct found by the Court of Appeals, petitioner had no way of surmising what wild speculations that Court would deduce from the record and utilize as a basis for removal.

By bunching uncharged conduct with charged conduct, the New York Court of Appeals has rendered its opinion fatally offensive to due process. The Court of Appeals in its opinion finds that the charged conduct, plus the uncharged conduct that it includes in its plenary findings, is sufficient to remove

petitioner from office. There is absolutely no way of discerning whether the charged conduct standing free of the profound prejudice of the more serious uncharged conduct would sustain such a draconian result as removal from office and lifetime exclusion from judicial office of a long-time respected and unusually competent jurist.

The Court of Appeals course is further unconstitutionally offensive because it completely disregards that the proceeding is poisoned beyond redemption once uncharged conduct is intermingled with the limited charges of a formal complaint. (In re: Ruffalo, 390 U.S. 544, modified on other grounds, 392 U.S. 919) In the instant case the poisoning of the record is far from incidental. The uncharged conduct is graver than the charged conduct.

Additionally, the record

which the Court of Appeals utilized in determining the matter with its own plenary review, instead of remanding for a new hearing, was poisoned beyond redemption by extensive testimony, taken over objection, of a prejudicial and inflammatory nature that went beyond the charges. The Court of Appeals in its opinion expressly reflected the severe prejudicial nature of the testimony on this uncharged conduct when it referred to it as "often of a sensational nature". (A-44) Nevertheless, it also gave to its own opinion media flavor by quoting subject matter from the Commssion's Determination that it claimed it was ignoring.

A mere reading of the Commission's Determination (A-6 to A-36) is sufficient to conclude the fatally prejudicial extent to which it is poisoned by extensive matter of an inflammatory nature that is extraneous to the charges. It reads like

an afternoon soap opera and is virtually a carbon copy of the Referee's Report which is virtually a carbon copy of the Commission's brief to the Referee.

The use of the uncharged conduct, even if it were not largely a product of malicious fantasies, as in fact it is, is fatal to the fair hearing that is fundamental to due process. The findings contained in the uncharged conduct contorts innocent isolated events into a literal diatribe of egregious acts that are then manipulated to give credence to issues of fact within the period of charged conduct. This goes to the very core of the entire proceeding and the unjust finding of lack of candor. It converts a case that involved a loss of temper in a very private aspect of petitioner's life, into uncharged impropriety in his official conduct. It perverts an isolated course of anger in

the break-up of a private adult consenual relationship into a prolonged history of petitioner taking on-going advantage of Ms. Gertel. What could be more prejudicial to the relatively limited charges in the complaint. It is difficult to conceive of what could be more prejudicial to the issues than going beyond the charges to create the false image of the older employer taking on-going advantage of his "innocent" young employee. This fantasy contains everything but the evil villain tying the innocent young maiden to the railroad tracks as the train approaches. Both the Commission's Determination and the Opinion of the Court of Appeals is no more than the creation of prejudicial smoke to conceal the absence of fire.

Every conceivable aspect of petitioner's personal and professional relationship with his former employee was fully

explored in the Commission investigation. If there were a basis for further charges beyond those set forth in the complaint, the Commission could have voted those charges. It did not, because there was no basis, and to include such findings in the Commission's Determination was a denial of due process and for the Court of Appeals to do its own post-hearing and post-argument journey into speculative, uncharged and undefended conduct was certainly an even more dastardly denial of due process.

Since fact questions are not germane to this application, petitioner will not delineate the extent to which the Determination is replete with products of malicious fantasy, arrived at by dissecting disjointed and often false tid-bits out of context. Nor will petitioner review the further extent to which credible and documentary evidence adduced

by petitioner was ignored by the Referee almost to the extent that his report read like the product of an inquest in which the burden of proof was not on the Commission, but upon an absent accused.

What is germane to the instant application is the extreme extent to which the Opinion of the Court of Appeals departs from the perimeters of the complaint in a most prejudicial manner, a manner which clearly precluded a dispassionate view of the record as it related to the limited charges that were subject to the Court of Appeal's hasty review.

That this uncharged conduct was so inflammatory as to preclude any reasonable person from excluding it from their minds in reviewing the record is further evidenced by the opinion of the Court of Appeals itself. While it criticizes the taking and utilization of evidence of

uncharged conduct by the Referee and its use by the Commission, almost at the inception of its own opinion, it quotes some of the most horrendous, egregious and inflammatory findings of the Commission. This course could serve no purpose, except to give its opinion a flavor which would give a lay reader the impression that removal was justified. What it in fact establishes is that the Court of Appeals was profoundly influenced in its own fact finding by the findings in the Commission's Determination that exceeded the allegations of the complaint.

Conclusion

It is basic to a democratic society that there be some judicial avenue which would preclude a citizen from being deprived of a valuable property right without constitutional due process and its denial being subject to some judicial review. In this matter, the denial was ab

initio by the only court involved in the process. The magnitude of the deprivation is compounded when the property right is one intrinsic to the entire life of the aggrieved citizen. In the instant case this constitutes a sufficiently shocking wrong that sustains this Court assuming the burden of review. The alternative is to leave without remedy a shocking wrong by a court of original jurisdiction whose opinion is subject to no other review.

The necessity for review by this Court is substantially supported by the absence of any adequate state remedy or alternate federal remedy. Under the New York statutory procedure, the first and only court involved in judicial discipline is the New York State Court of Appeals. When it makes its own plenary findings, as it did in the instant case, in the absence of this Court granting certiorari, there is absolutely no review.

APPENDICES

APPENDIX A

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to

BERTRAM R. GELFAND,

Surrogate, Bronx County.

FORMAL WRITTEN COMPLAINT

1. Article VI, Section 22, of the Constitution of the State of New York establishes a Commission on Judicial Conduct (hereinafter "Commission"), and Section 44, subdivision 4, of the Judiciary Law empowers the Commission to direct that a Formal Written Complaint be drawn and served upon a judge.

2. The Commission has directed that a Formal Written Complaint be drawn and served upon Bertram R. Gelfand (hereinafter "respondent"), Surrogate of Bronx County.

3. The factual allegations set forth in Charge I state acts of judicial misconduct by respondent in violation of the Rules Governing Judicial Conduct of the Rules of the Chief Adminsitrator of the Courts (hereinafter "Rules Governing Judicial Conduct") and the Code of Judicial Conduct.

CHARGE I

4. From August 3, 1985, through December 31, 1985, in connection with his personal relationship with Irene Gertel, a law assistant on his staff from March 1978 to May 1984 and from September 1984 to September 10, 1985, respondent engaged in a course of misconduct, to wit:

(a) on August 3, 1985, respondent told Ms. Gertel she was "off the payroll" as of August 2, 1985, a statement made for personal reasons, unrelated to her official duties;

(b) on August 3, 1985, respondent

emptied Ms. Gertel's office of her personal effects and delivered them in boxes to Ms. Gertel's home for personal reasons, unrelated to her official duties;

(c) on or about August 3, 1985, to on or about September 17, 1985, respondent left obscene, annoying and otherwise offensive messages on Ms. Gertel's telephone answering machine;

(d) on or about August 4, 1985, respondent, in attempting to see Ms. Gertel at an apartment building in Riverdale to discuss personal matters, falsely identified himself to the doorman of that building as "Mike Lippman", who at the time was Ms. Gertel's attorney;

(e) in August 1985, respondent demanded to meet with, and then confronted, Steven Kessler about his relationship with Ms. Gertel, told Mr. Kessler that he knew the Bronx County District Atorney, who was Mr. Kessler's

employer, and threatened to speak to the District Attorney about Mr. Kessler's conduct;

(f) in August 1985, respondent left offensive messages on Steven Kessler's telephone answering machine, and in one such message respondent threatened to speak to Mr. Kessler's mother, who then served as Deputy Public Administrator in Bronx County, or to Mr. Kessler's father, to obtain Steven Kessler's permission for respondent to speak to Ms. Gertel.

(g) in or about late August or early September 1985, motivated by animus toward Ms. Gertel arising out of their personal relationship, respondent requested that New York State's Deputy Chief Administrative Judge, Milton Williams, view unfavorably any application for employment in the courts that Ms. Gertel might submit; and

(h) in early December 1985,

respondent met with Emanuel Kessler and Muriel Kessler, of the law firm of Kessler & Kessler, and indicated his displeasure at their having employed Ms. Gertel as an associate of their firm without first consulting him.

5. By reason of the foregoing, respondent violated Sections 100.1 and 100.2 of the Rules Governing Judicial Conduct and Canons 1 and 2 of the Code of Judicial Conduct.

WHEREFORE, by reason of the foregoing, the Commission should take whatever further action it deems appropriate in accordance with its powers under the Constitution and the Judiciary Law of the State of New York.

Dated: New York, New York
June 10, 1986

/s/_____
GERALD STERN
Administrator of the State
Commission on Judicial Conduct
801 Second Avenue
New York, New York 10017
(212) 949-8860

APPENDIX B

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to

BERTRAM R. GELFAND,

Surrogate, Bronx County.

DETERMINATION

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
John J. Bower, Esq.
David Bromberg, Esq.
Honorable Carmen Beauchamp Ciparick
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
John J. Sheehy, Esq.

The respondent, Bertram R. Gelfand, judge of the Surrogate's Court, Bronx County, was served with a Formal Written Complaint dated June 20, 1986, alleging that he engaged in a course of misconduct in connection with a female law assistant

in his court. Respondent filed an answer dated July 28, 1986.

By order dated July 30, 1986, the Commission designated the Honorable Matthew J. Jasen as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on October 14, 15, 16, 17, and 21, 1986, and the referee filed his report with the Commission on December 31, 1986.

By motion dated January 2, 1987, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent be removed from office. Respondent opposed the motion on February 9, 1987. The administrator filed a reply on February 13, 1987.

On February 20, 1987, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent is Surrogate of Bronx County and has been since January 1, 1973.

2. Irene Gertel was employed by respondent as a law assistant on his court staff from March 1978 to May 1984, and from September 1984 to September 10, 1985. From July to September 1984, Ms. Gertel worked as an attorney for the Mental Health Information Service.

3. Respondent and Ms. Gertel had a sexual relationship from September 1978 to August 2, 1985.

4. In December 1980, respondent was confronted about the sexual affair by Ms. Gertel's husband, who threatened to inform respondents's wife about the affair. Respondent told Ms. Gertel's husband that the affair was over.

5. In December 1980, respondent requested Ms. Gertel's resignation because of the problems her husband was causing as a result of the affair. Her husband

complained that Ms. Gertel's resignation had been requested for reasons other than merit.

6. In January 1981, respondent reconsidered his request for Ms. Gertel's resignation and allowed her to withdraw it. Shortly thereafter, sexual relations between respondent and Ms. Gertel resumed.

7. Ms. Gertel and her husband separated in March 1984.

8. In May 1984, respondent accused Ms. Gertel of having sexual relations with other men. Respondent requested and accepted Ms. Gertel's resignation because of his anger and jealousy over her purported affair with another man. Ms. Gertel resigned and subsequently went to work at the Mental Health Information Service ("MHIS").

9. The sexual relationship between respondent and Ms. Gertel continued during the period she worked at MHIS.

10. While she worked at MHIS, respondent accused Ms. Gertel of having an affair with a doctor with whom she worked.

11. In September 1984, respondent decided to rehire Ms. Gertel on a trial basis, over the objection of his chief law assistant.

12. In October 1984, respondent accompanied Ms. Gertel on a visit to her psychiatrist. Respondent told the psychiatrist that Ms. Gertel had been lying to the psychiatrist about her relationships with other men. Prior to visiting the psychiatrist, respondent drafted and had Ms. Gertel sign an agreement whereby she would be liable to him for $100,000 if she revealed to anyone that he had accompanied her to the session.

13. On or about February 22, 1985, Ms. Gertel told respondent that she would be attending a weekend synagogue function

at a friend's home. Respondent did not want her to attend the function and accused her of "going on the hunt" for men.

14. Because of his anger and jealousy, respondent informed Ms. Gertel by letter dated February 22, 1985, that her employment with the court was terminated, although no date for leaving was set.

15. Ms. Gertel then wrote a letter to respondent pleading for reinstatement and declaring that she had "lost all desire to go away for the weekend."

16. Upon receiving Ms. Gertel's letter, respondent in effect withdrew his decision to terminate her employment by not fixing a specific date by which she must leave the court.

17. Following this incident, respondent and Ms. Gertel continued to have sexual relations.

18. During the weekend of July 19, 20 and 21, 1985, respondent learned that Ms. Gertel had been dating and having sexual relations with Steven Kessler, an assistant district attorney in Bronx County. Respondent confronted Ms. Gertel about this affair, and she confirmed it.

19. Because of jealousy, respondent immediately demanded Ms. Gertel's resignation by Monday, July 22, 1985.

20. On July 22, 1985, Ms. Gertel submitted a letter of resignation to respondent but immediately requested permission to withdraw it. Respondent said that he would allow Ms. Gertel to withdraw her resignation, contingent upon her agreement not to date other men and upon her calling Steven Kessler to end their relationship. With respondent listening in on an extension, Ms. Gertel called Mr. Kessler from respondent's chambers and ended their relationship,

telling him that she had another lover, whom she did not identify.

21. On July 23, 1985, respondent summoned Ms. Gertel and Mr. Kessler to his chambers. Respondent told Mr. Kessler that he knew of his relationship with Ms. Gertel and repeatedly denigrated Ms. Gertel, calling her a "whore," a "slut," a "bitch" and "fucked up." Respondent said that while Ms. Gertel had been "screwing and fucking" Mr. Kessler, she had also been "screwing and fucking" another boyfriend. Respondent said that he knew that Mr. Kessler and Ms. Gertel had broken up and told Mr. Kessler to "stay away" from her.

22. From July 23 to August 2, 1985, respondent and Ms. Gertel frequently discussed her employment status. Respondent repeatedly demanded that, as a condition of remaining on his staff, Ms. Gertel make a "total commitment" to him in

their personal and sexual relationship and that she not date Mr. Kessler or other men.

23. On August 2, 1985, respondent told Ms. Gertel not to report for work the following Monday or thereafter unless she was prepared to make the "total commitment" to him that he desired. Ms. Gertel asked him to reconsider, and respondent said he would. They then went to Ms. Gertel's home and had sexual relations. Later that day, they again discussed a "total commitment," and Ms. Gertel agreed to make it. Respondent agreed that Ms. Gertel could return to work the following Monday.

24. During the evening of August 2, 1985, respondent called Ms. Gertel at her home and asked whether she understood the commitment that she had made to him.

25. On August 3, 1985, at approximately 7:00 A.M., respondent called

Ms. Gertel's home, but there was no answer. After several more unanswered calls, respondent concluded that Ms. Gertel was with another man and became upset and jealous.

26. Respondent then began leaving obscene and annoying messages on Ms. Gertel's answering machine. He accused her of being "tied up with a customer," a "hypocritical liar" and a "bitch." He referred to Ms. Gertel's roommate as "the other whore you live with" and made vulgar references to oral sex and to "lies" from her "fucking lips."

27. Later on the morning of August 3, 1985, respondent left a message on Ms. Gertel's answering machine that she was "off the payroll, effective 5:00 P.M. Friday, August second," that she should "immediately mail in [her] parking permit and keys," and that she should not "show [her] face around this courthouse again."

Respondent made these statements out of jealousy for personal reasons unrelated to Ms. Gertel's official duties.

28. Later on August 3, 1985, respondent, accompanied by Ms. Gertel's attorney, Michael Lippman, an employee of the court, drove to the courthouse and entered Ms. Gertel's office. Respondent and Mr. Lippman took various personal items from Ms. Gertel's desk, cabinet and walls and put them into two boxes. They then drove to Ms. Gertel's home and left the boxes on her porch. In doing so, respondent acted out of jealousy for personal reasons unrelated to Ms. Gertel's official duties.

29. Throughout August 3 and 4, 1985, respondent left numerous messages on Ms. Gertel's answering machine, many of which were obscene, annoying and otherwise offensive.

30. In an attempt to reach Ms.

Gertel, respondent also left numerous offensive messages on Mr. Kessler's answering machine. One such call was made at about 2:30 A.M. on August 4, 1985. In another message, respondent threatened to go to Mr. Kessler's mother, Muriel, who was then the Deputy Public Administrator in the Bronx, an employee of respondent, in order to get to speak with Ms. Gertel.

31. Respondent, or Mr. Lippman at respondent's request, also placed calls to Ms. Gertel's roommate, her roommate's father, a friend, Ms. Gertel's brother and Mr. Kessler's grandmother in attempts to reach Ms. Gertel.

32. On Sunday, August 4, 1985, respondent and Mr. Lippman drove to Mr. Kessler's apartment building in search of Ms. Gertel. Respondent approached the doorman at Mr. Kessler's apartment building and identified himself as "Mike Lippman" in an attempt to reach Ms. Gertel

at Mr. Kessler's apartment.

33. Later in the evening of Sunday, August 4, 1985, respondent confronted Ms. Gertel outside Mr. Kessler's apartment building, and the two of them walked around the neighborhood and talked. Ms. Gertel complained about having been abruptly taken off the payroll and asked to be allowed to remain until September 4, 1985. Respondent said that he would put her on sick leave and allow her to stay until September 4.

34. Ms. Gertel told respondent in early August 1985 not to call her. Nonetheless, respondent left 30 obscene, annoying and otherwise offensive messages on her answering machine between August 3 and 5, 1985, and 39 additional obscene, annoying and otherwise offensive messages between August 5 and September 17, 1985.

35. On August 9, 1985, respondent appeared at Mr. Kessler's apartment

building in an attempt to see Ms. Gertel. Mr. Kessler refused to allow respondent to enter his apartment but agreed to meet respondent in the lobby of the building. The two men then walked around the neighborhood. Respondent repeatedly asked personal questions about Mr. Kessler's relationship with Ms. Gertel. Respondent several times mentioned the name of Bronx County District Attorney Mario Merola and reminded Mr. Kessler to tell the truth because he was an assistant district attorney. After Mr. Kessler returned to his apartment, respondent twice called him on the building intercom, demanding to be let into the apartment and insisting that Ms. Gertel was in the apartment. When Mr. Kessler again refused to let respondent in, respondent threatened to speak with Mr. Merola. Respondent said that he would tell Mr. Merola that Mr. Kessler was "harboring" Ms. Gertel and that he should

be fired from his job.

36. After his conversation with Mr. Kessler, respondent did meet with Mr. Merola to discuss Mr. Kessler's relationship with Ms. Gertel.

37. In late August or early September, respondent called Deputy Chief Administrative Judge Milton L. Williams, who supervises all trial courts, including respondent's, in New York City. The hiring of all lawyers and nonjudicial personnel in the New York City court system is subject to Judge Williams' approval.

38. Respondent asked Judge Williams to view unfavorably any application for employment in the court system by Ms. Gertel.

39. On October 10, 1985, respondent made a second call to Judge Williams to discuss Ms. Gertel.

40. In December 1985, Ms. Gertel

was hired as an associate in the law office of Emanuel Kessler, the father of Steven Kessler and the husband of Muriel Kessler, who at the time was Deputy Public Adminstrator in the Bronx.

41. Upon learning of Ms. Gertel's new employment, respondent summoned Mrs. Kessler to his chambers to ask why he had not been consulted prior to Ms. Gertel's hiring. With Mrs. Kessler before him, respondent called Emanuel Kessler by telephone. Emanuel Kessler suggested that they discuss the matter in person.

42. Emanuel Kessler subsequently met with respondent in respondent's chambers for about 45 minutes. Respondent denigrated Ms. Gertel and indicated his surprise that the Kesslers had hired her without consulting him. Respondent also told Emanuel Kessler that Mrs. Kessler's work in the court was "marginally effective."

43. Respondent's judgment as to each of his actions was affected by his personal relationship with Ms. Gertel. His conduct conveyed the unmistakable appearance that he was acting out of jealousy and not on the basis of merit.

44. Respondent lacked candor when he testified in this proceeding:

a) that he requested Ms. Gertel's resignation in December 1980 because her work was inadequate;

b) that his request for Ms. Gertel's resignation in May 1984 was because her work was inadequate;

c) that he decided to terminate Ms. Gertel's employment on February 22, 1985, because her work was inadequate;

d) That he demanded Ms. Gertel's resignation on July 22, 1985, because her work was inadequate;

e) that a meeting on July 23, 1985, with respondent, Ms. Gertel and Steven

Kessler never took place;

f) that he never made a telephone call to Mr. Kessler at 2:30 A.M. on August 4, 1985;

g) that he never approached a doorman and gave a false identity in an attempt to gain entrance to the building;

h) that he did not call Steven Kessler on August 9, 1985, and threaten to have him fired from his job;

i) that he did not attempt to keep Ms. Gertel from obtaining other employment in the court system;

j) that he did not initiate a meeting with Emanuel Kessler in December 1985 and express displeasure that he had not consulted with respondent before hiring Ms. Gertel; and,

k) that at all times he kept separate his personal and professional relationships with Ms. Gertel.

Upon the foregoing findings of fact,

the Commission concludes as a matter of law that respondent violated Sections 100.1 and 100.2 of the Rules Governing Judicial Conduct and Canons 1 and 2 of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

The gravamen of this proceeding is not the fact that respondent had become involved in an extra-marital relationship. However, it is evident from this record that respondent, for a period of years, based staffing decisions in his court on reasons other than merit in order to further has own interests in maintaining a personal relationship with a court employee. Such repeated abuse of judicial authority constitutes serious misconduct. Matter of Shilling v. State Commission on Judicial Conduct, 51 NY2d 397 (1980); Matter of Steinberg v. State Commission on

Judicial Conduct, 51 NY2d 74 (1980).

Six times in five years, respondent decided to hire or fire a law assistant not because of the quality of her work but because he was trying to control her personal life and force her to meet his pesonal demands for fidelity. On one of these occasions, respondent deceded to re-hire her over the objections of his chief law assistant. Such decisions could not have been made without a demoralizing effect on other staff and a deleterious effect on the operation of the court.

Respondent's raid on the law assistant's office, numerous annoying and obscene telephone calls, confrontations with the law assistant's friends, use of a false identity and attempts to impair her future employment deviated significantly from the high standards of conduct expected of judges, on and off the bench. Matter of Kuehnel v. State Commission on

Judicial Conduct, 49 NY2d 465 (1980); Matter of Steinberg, supra; Matter of Cerbone v. State Commission on Judicial Conduct, 61 NY2d 93 (1984).

Respondent compounded his misconduct by his repeated lack of candor in this proceeding. As the distinguished referee concluded, "Respondent lacked candor in this proceeding as to most material issues. His testimony was frequently evasive, inconsistent and, in many respects, incredible." Such deception is antithetical to the role of a judge who is sworn to uphold the law and seek the truth. Matter of Myers v. State Commission on Judicial Conduct, 67 NY2d 550 (1986); Steinberg, supra at 78 [fn]. The giving of false testimony is inexcusable and destructive of a judge's usefulness on the bench. Matter of Perry, 53 AD2d 882 (2d Dept. 1976).

It is uncontroverted that

respondent's reputation as a judge is superior. However, as the Court of Appeals noted in Matter of Shilling, supra at 399:

> A Judge whose conduct off the Bench demonstrates a blatant lack not only of judgment but also of judicial temperament and complete disregard of the appearances of impropriety inherent in his conduct, should be removed from office notwithstanding that his reputation for honesty, integrity and judicial demeanor in the legal community has been excellent.

By reason of the foregoing, the Commission determines that the appropriate sanction is removal.

Mrs. Robb, Mr. Bromberg, Judge Ciparick, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Ostrowski, Judge Rubin, Judge Shea and Mr. Sheehy concur.

Mr. Bower concurs in a separate opinion.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct, containing

the findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

Dated: March 20, 1987

/s/_____
Lillemor T. Robb, Chairwoman
New York State
Commission on Judicial Conduct

CONCURRING OPINION BY MR. BOWER

I concur in the finding of misconduct and the sanction of removal. I write separately only because I should like to emphasize my reasons for imposing the most severe sanction available in the case of a highly respected and competent judge.

There are aspects of our personal lives that should not be a matter of public scrutiny. Some of the underlying charges against respondent and their origins fall in this area. If we start with the premise that the right of an individual to privacy is more than illusory, we must be careful in considering the borders of that privacy and limit our inquiry at some reasonable point where we do not violate them.

Given the nature and length of the relationship between respondent and Ms. Gertel, the language used, either in

person or on the telephone, discussions of intimate matters, commentary on others who might threaten the relationship, fall, in my opinion, within the ambit of an area protected by the right to privacy. I do not consider myself, or for that matter, any of my colleagues on the Commission, as having the duty to impose our sense of morality or good taste on the behavior at issue. Similarly, given the intense emotional atmosphere that pervaded the history of the relationship, just how far each party to it went to protect his or her imagined pride or feelings is a matter of judgment and taste which, in my opinion, is not for this Commission to oversee.

I perceive two important issues that are germane. First, was there a true abuse of judicial and administrative power by the respondent? Second, once the proceedings were begun, did he satisfy the

standards of candor expected of a judge?

Turning to the first issue, I am willing to distinguish some of the facts which the learned Referee found. For instance, I think that under the peculiar circumstances that existed between respondent, a married man, and Ms. Gertel, initially a married woman, we must pay some heed to the emotion-charged expectations or demands that each one made on the other. Each disappointed the other. This provoked reactions in respondent that can only be described as pathetic. His demanding her resignation repeatedly, his attempts to prolong a cooling relationship, his trying to break up what he perceived as her budding romance with another, all fall within that highly personal, private and emotion-charged area. So do the repeated annoying, lengthy and pathetic telephone calls. Of course, becoming a judge

doesn't mean that one ceases being human, and respondent's behavior was pathetically human. Even when carried to the preposterous limits of respondent's actions, it still comes within the ambit of essentially private behavior.

What constitutes the true misconduct in this regard are the clear attempts by respondent to damage Ms. Gertel after the end of the relationship. His direct attempt to prevent her re-employment in the court system and his interference with her employment in the private sector are nothing but vindictive venting of his spleen. They are truly bilious misuses of judicial and administrative power. His calls to Judge Williams and his talks with Mr. Kessler cannot be justified. This behavior is judicial misconduct. Of course, while serious, it would not be sufficient ground for removal. It is the second issue facing the Commission which

is far more troubling than the first.

When the Commission started an investigation based upon Ms. Gertel's complaints, the respondent gave false and misleading information and testimony in the followng material respects:

(a) He testified repeatedly that on the four separate occasions that he demanded Ms. Gertel's resignation, he did so only because he was dissatisfied with her competence and work performance;

(b) He testified that a meeting with Ms. Gertel and Mr. Kessler on July 23, 1985 never took place;

(c) He testified that at all times, he kept his personal and professional relationships with Ms. Gertel separate and his requests for her resignation were not for personal reasons;

(d) He testified that he did not make certain telephone calls at 2:30 A.M. when, in fact, he did;

(e) He testified that an incident involving his giving a false name to a doorman at an apartment house, never took place;

(f) he testified that he did not call Ms. Gertel's friend on the building intercom and did not threaten to have him fired from his job;

(g) He testified that the circumstances of the meeting between him and Mr. Kessler at the apartment house did not come about as alleged by Mr. Kessler;

(h) He testified that he did not request Judge Willaims to treat Ms. Gertel's application for future employment in the court system unfavorably; and,

(i) He testified that he did not initiate a meeting with Ms. Gertel's subsequent employer and did not express displeasure at the fact that she had been hired by him.

The above partial litany of

misstatements convinced the learned Referee to conclude that the respondent lacked candor as to most material issues and his testimony was frequently evasive, inconsistent and in many respects, incredible. Even if one could find that the underlying course of conduct, private or otherwise, was highly improper but not sufficient for removal, his subsequent lack of candor is totally opposed to the role of a judge who is sworn to uphold the law and seek the truth. The office of judge required respondent to cooperate in the investigation of the charges against him. Cooperation not only implies but requires truth and candor. The giving of false testimony not only is inexcusable but is destructive of a judge's usefulness on the Bench.

Respondent submitted numerous character references and encomiums from highly placed, reputable sources. It is

uncontroverted that his reputation as a judge has been superior. However, I weigh his conduct during these proceedings even more severely because of his superior intellect and find that his deviations from the truth are even more serious.

Respondent's emphasis on his emotion-charged and stressful period, bodering on irrational behavior in 1985, has no bearing on the issue of his utter lack of candor. He simply decided to "stonewall" the charges without being able to bestow internal logic on his story. His conduct during these proceedings bespeaks a willful attempt to pervert the truth. It is this which leads me to the inescapable conclusion that respondent has forfeited his right to remain on the Bench.

Dated: March 20, 1987

/s/_____
John J. Bower, Esq., Member
New York State
Commission on Judicial Conduct

APPENDIX C

STATE OF NEW YORK
COURT OF APPEALS

SCJC No. 183
In the Matter of the Honorable Bertram R. Gelfand, Surrogate, Bronx County,

Petitioner,

For Review of a Determination of State Commission on Judicial Conduct,

Respondent.

OPINION

PER CURIAM.

Petitioner has served as Surrogate of Bronx County since January 1, 1973. It is uncontested that prior to the disclosure of the events that are the subject of this proceeding, he was a respected member of the judiciary of our State. The evidence before us indicates, however, that his removal from office is warranted because of his misconduct between August 3, 1985 and December 31, 1985 and his subsequent lack of candor

with the State Commission on Judicial Conduct.

On June 20, 1986, at respondent's behest, respondent's administrator issued a formal complaint charging petitioner with eight separate acts of judicial misconduct during the period from August 3, 1985 to December 31, 1985. Each of the allegations involved acts by the Judge motivated by animus toward a former law assistant because of a personal and sexual relationship between them. (Footnote restating paragraph 1. of the formal complaint omitted since complaint appears in its entirety as Appendix A.) Petitioner admitted the relationship existed while the law assistant worked for him, but denied the material portions of the allegations of misconduct. The matter was referred for a hearing.

The evidence showed that, for a period of several years, petitioner had

engaged in an extramarital affair with one of his law assistants. In addition to sustaining all of the charges in the formal complaint and finding that petitioner lacked candor as to nearly all of the material facts in the proceeding, the referee found that petitioner had misued his position throughout the entire course of the affair to prolong the relationship. The Commission determined that petitioner engaged in a course of misconduct throughout the duration of the relationship and lacked candor at the hearing and that the sanction of removal was appropriate. We review the determination upon petitioner's request (Judiciary Law Section 44 [7] and [91).

Upon full factual review of the evidence adduced before the referee (NY Cons art 6, Section 22 [d]; Judiciary Law Section 44 [9]), we conclude that, during the period of August 3, 1985 to December

31, 1985, petitioner misused his position as Surrogate of Bronx County by making administrative and personnel decisions, taking official actions, and making implicit and explicit threats to court officials and others in order to prolong a sexual relationship with a law assistant and, later, to exact personal vengeance when she refused to continue their affair. On August 3, 1985, petitioner fired the law assistant based on events in their personal relationship. Shortly thereafter, he emptied her office desk and left the contents on the doorstep of her residence. At that time, petitioner made more than 60 telephone calls -- leaving annoying and obscene messages -- but the law assistant apparently had resolved neither to return his calls nor to pursue the relationship. In a desperate effort to reach her, he falsely identified himself to a doorman as her attorney on

one occasion and on another threatened to speak to her boyfriend's parents if the boyfriend would not allow petitioner to speak to her. Petitioner confronted the boyfriend, accused him of "harboring" the law assistant and threatened to speak to his employer, the Bronx District District Attorney, to have him fired if he did not reveal the whereabouts of the law assistant. At the end of August or in early September, 1985, petitioner called the Deputy Chief Administrative Judge and asked him to view unfavorably any application that the law assistant might submit for a position in the court system. Finally, in early December, 1985, petitioner met with the law assistant's new employer -- her boyfriend's father. The father was an attorney, a social acquaintance of petitioner and the husband of an employee in petitioner's court. Petitioner remonstrated with the father

because he had hired the law assistant without first consulting him. This highly improper conduct was compounded further by petitioner's lack of candor during the course of these proceedings wth respect to both the motivation underlying his actions, just described, and many background incidents introduced by either petitione or the Commission, including testimony that was evasive, incredible and false.

We conclude that this conduct constituted inexcusable violations of sections 100.1 and 100.2 of the Rules Governing Judicial Conduct and Canons 1 and 2 of the Code of Judicial Conduct. Petitioner's repeated misuse of his judicial powers and his subsequent failure to be candid in this proceeding were in conflict with the standards of integrity and propriety required of members of the judiciary, and inimical to his role as a judge

(Canon 1 of the Code of Judicial Conduct; see, Matter of Myers, 67 NY2d 550, 554). By allowing his personal relationships to influence both his judgement and the administration of the court over which he presides he could not help but impair public confidence in his integrity and impartiality. (Canon 2 of the Code of Judicial Conduct; Matter of Sims, 61 NY2d 349, 359). The effectiveness of the judicial system is dependent upon the public's trust and violations such as these which undermine that trust are so contrary to the ethical obligations required of judges in conducting their personal and judicial duties that removal is essential (see Matter of Aldrich v State Comm., 58 NY2d 279, 283; Matter of Shilling, 51 NY2d 397, 402; Matter of Kuehnel, 49 NY2d 465, 469).

We draw these conclusions, however, without regard to any misconduct that may

have occurred prior to the time period described in the formal complaint served upon petitioner. While the referee may have allowed relevant evidence of event predating the alleged misconduct in order to clarify or to provide background for the formal charges, the complaint did not charge petitioner with misconduct prior to August 1985. Accordingly, it was unnecessary and indeed improper for the commission to include in its determination extensive findings of fact and legal conclusions based on uncharged incidents -- often of a sensational nature -- which preceded the dates covered by the complaint or to consider such conduct in its determination of sanction. Indeed, the Commission's responsibility to safeguard the public`s trust in the judiciary by both shielding innocent judges from unjust charges and exposing and disciplining those who have abused their

office is not fulfilled where uncharged conduct forms the basis of its published determination. Due process requires that petitioner not be deprived in this proceeding of his interest in continuing as a judge because of the uncharged misdeeds (Matter of Murray v Murphy, 24 NY2d 150, 157; see, Matter of Seiffert, 65 NY2d 278, 280). Because of our power to review the facts in cases involving judicial misconduct (NY Cons art 6, Section 22 [d]; Judiciary Law Section 44 [91], however, a new hearing is unnecessary. We conclude that the acts that were described in the formal complaint and proven at the hearing constitute sufficient cause for removal.

For the foregoing reasons, the determined sanction of removal is accepted, without costs.

* *

Determined sanction accepted, without

costs, and Bertram R. Gelfand is removed from his office of Surrogate, Bronx County, effective immediately. Opinion Per Curiam. Judges Simons, Kaye, Alexander, Titone and Hancock concur. Chief Judge Wachtler and Judge Bellacosa took no part.

Decided July 2, 1987